

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
BRANDEL CONSTRUCTION CORP.,
LESSLEY CONSTRUCTION, INC.,
AND BALSER INVESTMENTS, INC.,

PCHB Nos.-85-136,
85,141, and 85-154

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER, the appeals of a Notice and Order of Civil Penalty of \$500 for burning an outdoor fire containing prohibited materials, came on for hearing before the Pollution Control Hearings Board at Seattle, Washington, on September 19, 1985. Sitting as the Board were Wick Dufford (presiding) and Lawrence J. Faulk, Chairman. Respondent agency elected a formal hearing pursuant to RCW 43.21B.230.

1 Three separate appeals were filed relating to Notice and Order o.
2 Civil Penalty No. 6291 issued by the Puget Sound Air Pollution Control
3 Agency (PSAPCA) on July 16, 1985. These were consolidated for
4 hearing. Appellant Balser Investments was represented by its
5 president, Richard A. Balser. Lessley Construction was represented by
6 its president, Winton Lessley. Appellant Brandel Construction did not
7 appear. Respondent PSAPCA was represented by its attorney, Keith D.
8 McGoffin.

9 Witnesses were sworn and testified. Exhibits were examined.
10 Argument was heard. From the testimony, evidence and contentions of
11 the parties, the Board makes these

12 FINDINGS OF FACT

13 I

14 Respondent PSAPCA, pursuant to RCW 43.21B.260, has filed with the
15 Board a certified copy of its regulations and all amendments thereto.
16 We take official notice of these regulations.

17 II

18 In the afternoon of April 12, 1985, the Bothell Fire Department
19 was contacted regarding an outdoor fire, reported as creating
20 hazardous smoke conditions. Fire Marshal Clifford R. Vaniman
21 responded and went to the scene, next to 1224-28th Place S.W. in
22 Bothell, with an engine company. There he observed a large land
23 clearing pile being burned. A flatbed truck was in the process of
24 unloading building scraps, including metal, plastic, PVC pipe,
25 cardboard boxes, scrap lumber and other construction materials, and

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1 these were being placed in the fire.

2 The Fire Marshal took photographs of the fire, showing the debris
3 placed in it. Fireman Frank Migliore, also present at the scene,
4 corroborated Vaniman's observations.

5 The burning pile was 36 feet from an occupied house and about 50
6 feet from a large wooded area. No firefighting equipment was on site
7 when the firemen arrived. The Fire Department proceeded to extinguish
8 the blaze.

9 III

10 Balser Investments purchases tracts of property, prepares them for
11 development and then sells to developers, usually at the building
12 permit stage. Balser does land clearing for streets but not for
13 individual lots. The site of the fire in question was one of 50 lots
14 in a development Balser was in the process of selling. The earnest
15 money agreement had been signed by Brandel Construction, which
16 eventually completed the purchase.

17 Balser had no involvement with the fire, other than bare legal
18 title to the land. Balser did not authorize the fire or indeed, even
19 know it occurred until so informed after the fact through a phone call
20 from PSAPCA.

21 IV

22 In the development involved here, lots were purchased by both
23 Brandel Construction and Lessley Construction to build homes. Some
24 workers for Lessley were cleaning waste materials from houses and
25 hauling the material away in a truck. The truck was hailed by
26

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1 employees of Brandel who asked that the scraps be added to a fire o.
2 wet stumps they were having trouble maintaining. The Lessley workers
3 acquiesced and the result was the situation observed by the Fire
4 Department.

5 V

6 The Bothell Fire Departmnet forwarded a report of the incident of
7 PSAPCA which was received on April 17, 1985. A PSAPCA inspector went
8 to the scene on April 24, 1985, found evidence of burning, but no
9 construction debris was then present on the burn pile.

10 A check of the records revealed an effective Population Density
11 Verification (PDV) issued to Brandel Construction. This document,
12 verifying that the population density within .6 of a mile of a
13 proposed burn site is less than 2500 persons, establishes that the
14 locale is sufficiently rural for land clearing burning, as defined, to
15 be carried on without further approval from PSAPCA. The PDV states on
16 its face:

17 The outdoor fires must not contain any material
18 other than trees, stumps, shrubbery or other
19 natural vegetation which grew on the property being
cleared.

20 VI

21 PSAPCA sent a Notice of Violation to Brandel Construction, Lessley
22 Construction and Balser Investments on May 9, 1985, alleging that the
23 fire on April 12 violated the agency's Regulation I, Article 8.02(3),
24 which states that fires containing certain prohibited materials are
25 unlawful. On July 16, 1985, the agency sent to the same three
26 entities Notice and Order of Civil Penalty No. 6291, assessing a

1 penalty of \$500 for the event.

2 This was separately appealed to this Board by Balser (July 24,
3 1985); Brandel (July 30, 1985); and Lessley (August 13, 1985).

4 VII

5 PSAPCA's enforcement files reveal a record of past open burning
6 infractions by Lessley Construction on three separate occasions. One
7 of these involved an appeal to this Board which sustained the
8 violation; Lessley Construction Co. v. PSAPCA, PCHB 77-38 (June 21,
9 1977). However, no violations are shown for the past five years.

10 Neither Brandel Construction nor Balser Investments have any prior
11 record of violations.

12 VIII

13 None of the parties who appeared at the hearing contested that a
14 fire containing construction debris did occur on April 12, 1985, on
15 the site identified. Mr. Balser argued that his organization was not
16 involved in the incident and should not be held legally responsible
17 for the fire. Mr. Lessley, advised that having learned from past
18 experience, it is his company's policy to haul building scraps to the
19 dump. The incident in question was, he stated, unauthorized and an
20 isolated aberration. He asked that any fine assessed be apportioned
21 as between his organization and Brandel Construction.

22 IX

23 Any Conclusion of Law which is deemed a Finding of Fact is hereby
24 adopted as such.

25 From these Findings of Fact, the Board comes to these
26 FINAL FINDINGS OF FACT,
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1 CONCLUSIONS OF LAW

2 I

3 The Board has jurisdiction over the persons and these matters.
4 Chapters 43.21B and 70.94 RCW.

5 II

6 PSAPCA's Regulation I, Section 8.02(3) states:

7 It shall be unlawful for any person to cause or
8 allow any outdoor fire:

9 (3) containing garbage, dead animals, asphalt,
10 petroleum products, paints, rubber products,
11 plastics or any substance other than natural
vegetation which normally emits dense smoke or
obnoxious odors.

12 This language essentially repeats the terms of RCW 70.94.775.

13 III

14 We conclude that the outdoor fire occurring next to 1224 228t
15 Place, S.W., Bothell, Washington, on the afternoon of April 12, 1985,
16 violated Section 8.02(3) of Regulation I.

17 IV

18 Under PSAPCA Regulation I, Section 8.04(b) the person who "owns or
19 controls" property on which an outdoor fire occurs is prima facie held
20 to have "caused or allowed" the fire. This presumption arising from
21 ownership is, however, rebuttable, and we conclude that it has been
22 rebutted here by Balser Investments, Inc. Under the circumstances
23 shown, we decide that Balser Investment did not "cause or allow" the
24 violation in question.

25 V

26 Brandel Construction did not appear for the hearing and PSAPCA

1 moved to dismiss their appeal because of this default. We grant this
2 motion and, therefore, affirm the penalty assessed as to Brandel.

3 VI

4 As to Lessley Construction, we conclude that it too should be held
5 legally responsible for the violation which occurred. The actions of
6 its employees were inextricably a part of the cause of the event.

7 VII

8 On the record made, we think the amount of the penalty is
9 reasonable. The violation was flagrant and deliberate. Given the
10 history of problems, Lessley's workers certainly should have known
11 better. Brandel's employees should be charged with understanding the
12 conditions expressly stated on the PDV issued to the company. The
13 \$500 assessed is just half of the maximum that could be imposed for
14 this kind of violation.

15 VIII

16 RCW 70.94.431 authorizes the assessment of a civil penalty against
17 "any person who violates any of the provisions" of chapter 70.94 RCW
18 or any of the rules and regulation therunder. Moreover, "each act of
19 commission or omission which procures, aids or abets in the violation"
20 is itself a violation.

21 In the case before us, Brandel Construction and Lessley
22 Construction are in the position of joint tortfeasors. They are
23 jointly and severally liable for the penalty. In this situation it is
24 not for us to apportion the amount as between them. They must resolve
25 that matter between themselves or by such other remedies as are

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1 available.

2 IX

3 Any Finding of Fact which is deemed a Conclusion of Law is hereby
4 adopted as such.

5 From these Conclusions of Law the Board enters this
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ORDER

PSAPCA's Notice and Order of Civil Penalty No. 6291 is affirmed as to appellants Brandel Construction Corporation and Lessley Construction, Incorporated. Said Notice and Order is reversed as to Balser Investments, Incorporated.

DONE this 27th day of November, 1985.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford

WICK DUFFORD, Lawyer Member

Lawrence J. Faulk 11/26/85

LAWRENCE J. FAULK, Chairman